American Bar Association
www.supremecourtpreview.org

No. 07-581

IN THE

Supreme Court of the United States

14 PENN PLAZA, LLC AND TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL, AND MICHAEL PHILLIPS,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SAMUEL ESTREICHER
(Counsel of Record)
TODD R. GEREMIA
JONES DAY
222 East 41st Street
New York, New York 10017
(202) 326-3939

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. *GARDNER-DENVER* DOES NOT APPLY IN CASES WHERE ARBITRATORS HAVE BEEN GIVEN EXPLICIT AUTHORITY TO DECIDE CLAIMS ARISING UNDER FEDERAL AND STATE STATUTES AND REGULATIONS IN ACCORDANCE WITH THOSE LAWS. 7

II. STRONG POLICY CONSIDERATIONS SUPPORT THE ENFORCEABILITY OF UNION-NEGOTIATED AGREEMENTS TO ARBITRATE THE INDIVIDUAL STATUTORY CLAIMS OF REPRESENTED EMPLOYEES 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Air Line Pilots Ass'n v. O'Neill,
499 U.S. 65 (1991) 11

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) ..... *passim*

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 4, 10

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 2, 5, 8

Collins v. New York Transit Auth.,
305 F.3d 113 (2d Cir. 2002) 6, 13

Ford Motor Co. v. Huffman,
345 U.S. 330 (1953) 11

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) ..... *passim*

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 11

Green Tree Fin. Corp. v. Randolph,
531 U.S. 79 (2000) 13

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 12

McDonald v. City of West Branch,
466 U.S. 284 (1984) 4, 10

Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc., 435 U.S. 614 (1985) 5

NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974) 15

Preston v. Ferrer,
128 S. Ct. 978 (2008) 5

TABLE OF AUTHORITIES
(Continued)

Page

Pyett v. Penn. Bldg. Co.,
498 F.3d 88 (2d Cir. 2007) 3, 9
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 7
Steele v. Louisville & Nashville R.R.,
323 U.S. 192 (1944) 11
United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960) 10
Wilko v. Swan, 346 U.S. 427 (1953) 7
Wright v. Universal Maritime Serv. Corp.,
525 U.S. 70 (1998) 2, 4, 5, 10

Statutes

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* 1, 6
9 U.S.C. § 3 14
29 U.S.C. § 152(11) 15
29 U.S.C. § 159 14
Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.* 9, 11

Miscellaneous

Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example* (available at www.ssrn.org) 2
John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983 (1991) 15

TABLE OF AUTHORITIES
(Continued)

Page

Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 2003/2004 DISPUTE RES. J. 44 2
Samuel Estreicher, *Beyond Cadillacs and Rickshaws: Towards A Culture of Citizen Service*, 1 N.Y.U. J. LAW & BUS. 323 (2005) 15
William M. Howard, *Arbitration Claims of Employment Discrimination: What Really Does Happen? What Should Really Happen?* DISP. RESOL. J. Oct.-Dec. 1995 15
Bruce E. Kaufman & Jorge Martinez-Vasquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. LAB. RES. 401 (1990) 12
Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) 15
David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1558 (2005) 2

STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is being filed on behalf of the Chamber of Commerce of the United States of America (the "Chamber").[1] The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size and from every industry sector, and region of the country. The Chamber advocates the interests of the business community in courts across the nation in part by filing *amicus curiae* briefs in cases raising issues of national concern to its members. The Chamber has long been interested in promoting a fair employment dispute resolution system that avoids the unnecessary costs, distractions, delays and strategic behaviors characteristic of the civil litigation process.

Through its decisions interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), this Court has signaled a receptivity to enforcing predispute arbitration agreements between employers and employees—whether they involve claims under an employment contract or under federal or state anti-discrimination and other statutes. The Chamber has been actively involved in encouraging the Court to take these steps, and has filed *amicus curiae* briefs in support of the employment arbitration position adopted in such landmark cases as *Gilmer v. Interstate/Johnson Lane*

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Corp., 500 U.S. 20 (1991), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

In part as a result of the Court's FAA decisions, many of the Chamber's members have established in-house dispute resolution systems culminating in final, binding arbitration. The empirical studies conducted to date, although still an emerging literature, fairly uniformly give high marks to this effort of U.S. employers to provide a fair alternative to the court system. Contrary to the fears expressed by some in the plaintiff bar, these in-house processes culminating in arbitration have been found to do a laudable job of providing an accessible, prompt mode of redress for many employment disputes.[2]

The instant case illustrates one area, however, where these salutary new developments have not fully taken hold—the arbitration of statutory employment claims in the union-represented sector. Unions represent about 8% of U.S. workers in private companies, and a substantial number of the Chamber's members are signatories to collective bargaining agreements covering segments of their workforce. Because of over-readings of the Court's

---

[2] *See, e.g.*, Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 2003/2004 DISPUTE RES. J. 44; David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1558 (2005); Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example* (available at www.ssrn.org).

holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), as exemplified by the decision below, employers and employees alike are deprived of the benefits of an internal system culminating in arbitration for resolving statutory employment claims—even where labor agreements expressly authorize arbitrators to resolve not only contractual claims but also various statutory (including employment discrimination) claims asserted by union-represented employees.

As Petitioners point out, this inability to tap fully the benefits of employment arbitration in settings where unions have bargaining authority may complicate labor relations practices for certain employers. Pet. Br. 32. Because we believe that our members and their employees are adversely affected by the Second Circuit's unwarranted *per se* rule barring enforcement of clear and unmistakable union-negotiated agreements requiring represented employees to pursue their employment claims in arbitration rather than in court, the Chamber has filed this brief in support of Petitioners' position that their motion to compel arbitration should have been granted.

SUMMARY OF ARGUMENT

The court of appeals in this case reaffirmed its *per se* rule that "arbitration provisions contained in a [collective bargaining agreement], which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." 498 F.3d 88, 93-94 (2d Cir. 2007). The only issue in this case is whether this *per se* barrier is required by law, even where a union-negotiated arbitration agreement expressly authorizes the arbitrator to resolve the

dispute in accordance with applicable employment discrimination statutes or other laws and, if violations are found, award statutory (or other available) remedies, as required under *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Unlike the arbitral proceedings convened under the general arbitration clause at issue in *Wright*, the arbitrator here does not sit merely as a "proctor of the bargain." Here, the arbitrator sits to resolve the full range of employment disputes that represented employees may have, whether they raise contractual claims only or also assert claims under federal or state statutes or other laws. In this case, the only waiver plausibly involved is the procedural right to a judicial forum instead of arbitration; the arbitrator is obligated to ensure against waiver of any substantive rights.

Contrary to the reasoning of the court below, this Court's 1974 decision in *Alexander v. Gardner-Denver*, 415 U.S. 36, does not create a *per se* rule barring enforcement of union-negotiated agreements requiring represented employees to take their statutory claims to arbitration instead of court. The Court in that case considered, and properly rejected, an attempt to use a purely contractual arbitration process—where the arbitrator sits only as "the proctor of the bargain," *Gardner-Denver*, 415 U.S. at 53, and may not rely on external law—to foreclose the adjudication of statutory employment claims. Neither the facts of *Gardner-Denver* nor the two cases often cited as its progeny, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984), dealt with situations where, as

here, arbitrators have been given explicit authority to decide the statutory claims of employees in accordance with applicable external laws.

Moreover, the current legal landscape is vastly different from that which led to the 1974 ruling. Disavowing its earlier skepticism of arbitral competence to decide statutory issues, the Court has developed a robust jurisprudence under the FAA, establishing a presumption of arbitrability encompassing nearly all employment disputes, whether sounding in contract, tort, employment discrimination or other statutory law. Although substantive rights can never be waived in predispute arbitration agreements, the Court has made clear that the purely procedural right to a judicial forum can be exchanged for an arbitral forum—thus removing a critical underpinning of *Gardner-Denver* that prospective waivers of the right to a judicial forum are inherently suspect. *See Preston v. Ferrer*, 128 S. Ct. 978, 987 (2008) ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (ellipsis in original). Indeed, *Wright*, *Gilmer*, and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), confirm that a wide range of statutory employment claims can properly fall within the purview of an arbitrator who has been given the authority to resolve disputes in accordance with applicable law.

There may be occasions where unions will not act as faithful agents of their members in the

arbitration process. But, given the FAA-based presumption of arbitrability, the presumption of regularity that attaches to the union's obligations as the statutory exclusive bargaining agent, and the union's statutory duty to fairly represent the interests of all represented employees, it cannot be assumed that the interests of the labor union and represented employees will always or even frequently diverge. In the relatively few cases where employees question the fairness of the arbitration process, they should have to demonstrate an evidentiary basis for their claim of bias, which the courts will be able to evaluate, as they do now in cases like *Collins v. New York Transit Authority*, 305 F.3d 113 (2d Cir. 2002).

Finally, strong public policy considerations support enforceability of arbitration promises in the union-represented sector, whether the dispute is one arising under contract law or under employment discrimination statutes. Among these are the considerations of judicial efficiency, employer decision-making efficiency, and employees' access to competent counsel. These considerations, as well as those identified by Petitioners (Pet. Br. 32), weigh heavily toward the practical conclusion that both represented employees and the overall dispute resolution system have little to gain, and much to lose, from the *per se* rule of union incapacity adopted below.

ARGUMENT

I. *GARDNER-DENVER* DOES NOT APPLY IN CASES WHERE ARBITRATORS HAVE BEEN GIVEN EXPLICIT AUTHORITY TO DECIDE CLAIMS ARISING UNDER FEDERAL AND STATE STATUTES AND REGULATIONS IN ACCORDANCE WITH THOSE LAWS.

The Second Circuit purportedly derived from *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), its rule that union-negotiated waivers of represented employees' right to a judicial forum for their statutory claims are never enforceable. Some of the language in *Gardner-Denver,* if viewed in isolation, can be invoked as support of this ostensible rule. However, as the Court's reliance on *Wilko v. Swan*, 346 U.S. 427 (1953), makes clear, *see Gardner-Denver*, 415 U.S. at 52, 58, the 1974 decision reflected an earlier period of judicial skepticism regarding the competence of private arbitrators to decide statutory claims. *Wilko* was subsequently overruled in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), and the Court has significantly altered its view of arbitral competence, ruling that a wide range of statutory claims fall within the presumption of arbitrability established by the FAA. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-26 (1991) (recounting this history).

More to the point, the Court has rejected the critical underpinning of *Gardner-Denver*: that "an employee's rights under Title VII [and, by extension, other federal employment statutes] are not susceptible of prospective waiver." *Gardner-Denver*, 415 U.S. at 51-52. For, indeed, both *Gilmer* (which

involved the arbitrability of claims under the Age Discrimination in Employment Act), and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (which involved the arbitrability of statutory employment discrimination claims under state law), could not be clearer on the distinction between the right to a judicial forum, which can be waived in favor of arbitration, and the substantive rights embodied in these laws, which cannot be waived by predispute agreements: "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28 (internal quotation marks omitted; brackets in original). *Circuit City* also read the FAA to cover the employment disputes of almost all U.S. workers, excluding only transportation workers.

This change in the governing legal landscape, in the view of *amicus*, requires a reassessment of the actual holding in *Gardner-Denver.* The decision in that case was predicated on the limited scope of authority of labor arbitrators when they are empowered to hear only contractual disputes and have not been authorized to resolve the statutory claims of represented employees. As the Court later observed in *Gilmer*, *Gardner-Denver* and its progeny "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 500 U.S. at 35. In the instant case, not only does the labor agreement provide expressly for the arbitration of claims arising under the specified federal and state

employment statutes but also the arbitrator, a trained lawyer, has been given explicit authority—and shoulders an obligation—to "apply appropriate law in rendering decisions based upon claims of discrimination." 498 F.3d at 90 (quoting collective bargaining agreement in the instant case).

The argument rejected in *Gardner-Denver* contained an element of overreaching – an attempt to use a purely contractual process to foreclose consideration of an employee's statutory claim. Harrell Alexander, Sr., with his union's assistance, presented his discharge grievance to the arbitrator, but the arbitrator had not been given authority to consider his racial discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Court pointedly noted that labor arbitrators, unless they have been given such authority, sit merely as creatures of the collective bargaining agreement:

> *As the proctor of the bargain*, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be*

> *enforced.* Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

415 U.S. at 53-54 (emphasis added) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (internal citations omitted).

The critical importance of granting the arbitrator explicit authority to resolve statutory claims explains in large part this Court's insistence in *Wright v. Universal Maritime Serv. Corp.,* 525 U.S. 70 (1998), on a "clear and unmistakable" union-negotiated waiver of the right to a judicial forum. In *Gardner-Denver* and the two decisions often cited as its progeny,[3] the arbitrator could act only as a conventional labor arbitrator; the arbitrator had authority only to resolve contractual issues under the collective bargaining agreement. But where, as here, the arbitrator is empowered to decide the case in accordance with the "appropriate law" and is legally trained,[4] he does not sit merely as a "proctor of the

[3] *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) ("Although an arbitrator may be competent to resolve many preliminary factual questions . . ., he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute [Fair Labor Standards Act] has been violated."); *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) ("[B]ecause an arbitrator's authority derives solely from the contract, . . . an arbitrator may not have the authority to enforce § 1983.").

[4] This was another concern of *Gardner-Denver* and its progeny. *See Gardner-Denver*, 415 U.S. at 57 n.18; *Barrentine*, 450 U.S. at 743 & n.2; *McDonald*, 466 U.S. at 290 & n.9.

bargain," but is also affirmatively charged with enforcing substantive rights under external law.

It is, of course, true that in some cases where unions represent grievants in arbitration proceedings, there may arise a "tension between collective representation and individual statutory rights[.]" *Gilmer*, 500 U.S. at 35. More generally, in some cases there may also be a tension between collective representation and the rights of particular individuals. But this Court long ago recognized the union's duty of fair representation owed to all represented employees as a critical mechanism for mediating such tensions or disagreements. *See Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *see also Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). That duty would, of course, apply to the union's representation of employees in arbitration.[5]

It is, however, inconsistent with the FAA-based presumption of arbitrability, the presumption of regularity that labor unions enjoy as the exclusive statutory bargaining agent for represented employees, or a union's legal duty to fairly represent employees in the bargaining unit to erect a legal presumption that there is an inherent and inevitable conflict of such magnitude between the labor union and represented employees when dealing with statutory claims that arbitral promises must be categorically disregarded. In many cases, there is no

[5] That obligation is reinforced by the affirmative duty under Title VII and other statutes imposed on the collective bargaining representative to not discriminate on racial and other prohibited grounds in performing its contract negotiation and administration functions. *See, e.g., Goodman v. Lukens Steel Co.,* 482 U.S. 656 (1987).

plausible basis for assuming the actual or even likely presence of a conflict because the employee's statutory claim merely adds another helpful, supplementary legal theory to what is, in essence, a challenge to the factual basis for a disciplinary action. In other cases, the claim of older workers to be free of age discrimination dovetails with the union's longstanding, deeply felt interest in protecting the seniority of long-service employees.[6] Individuals complaining of discrimination in favor of younger workers are likely also to be protected by the union-negotiated seniority system. In yet other cases, the union may step aside to relinquish control of the arbitration process in favor of members who are able to attract private counsel. In those relatively few instances where, after an award has issued and a represented employee presents a factual basis for challenging the fairness of the arbitration in the particular circumstances, courts are well-positioned, as they now are when reviewing any award or even allowing an award into evidence, to determine whether the process was fair and whether the award was rendered by an "independent, neutral, and unbiased adjudicator that had the power to prevent the termination" or provide other sought-for

---

[6] *See generally* Bruce E. Kaufman & Jorge Martinez-Vasquez, *Monopoly, Efficient Contract, and Median Voter Models of Union Wage Determination: A Critical Comparison*, 11 J. LAB. RES. 401 (1990) (importance of seniority principle to union decision-making). It may not infrequently be the case that the union will be on firmer ground asserting a claim based on the seniority provisions of the collective bargaining agreement rather than stretching to premise a claim on federal age discrimination law. *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

relief. *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002).

In all events, the Court has not allowed mere speculative concerns about fairness or conflicts to derail arbitration agreements. The plaintiff in *Gilmer*, for example, argued that arbitration panels in the securities industry were likely to be biased, that pre-hearing discovery was likely to be deficient, that arbitrators do not often issue written opinions, that appellate review of awards was likely to be ineffective, and that individuals lack sufficient bargaining power to negotiate appropriate arbitration agreements with their employers. The Court's response was to correctly reject these "generalized attacks on arbitration," *Gilmer*, 500 U.S. at 30, in favor of awaiting "resolution [of claims of unfairness] in specific cases." *Id.* at 33. We believe the same approach is warranted here concerning any "generalized attacks" on the ability of unions to be faithful agents for bargaining unit employees in the arbitration process. *See also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). But even if, for the sake of argument, the Court believes there is warrant for a deeper concern, the better approach would be not to bar enforcement of union-negotiated waivers of the right to a judicial forum as a *per se* rule but, rather, to send the case to arbitration while retaining the courts' ability to review any award for conformity with applicable law. Admittedly, a deferral or exhaustion approach was rejected in *Gardner-Denver* and its progeny but that was in a context where the arbitrator sat simply as "the proctor of the bargain," not a case, as here, where individual statutory employment claims are expressly arbitrable and the arbitrator has been given explicit authority to apply

statutory law in deciding those claims. Where arbitrators have such authority, deferral to arbitration or exhaustion of contractual remedies[7] is not likely to be an exercise in futility, and a stay of litigation pending arbitration is affirmatively authorized by the FAA § 3.[8]

II. STRONG POLICY CONSIDERATIONS SUPPORT THE ENFORCEABILITY OF UNION-NEGOTIATED AGREEMENTS TO ARBITRATE THE INDIVIDUAL STATUTORY CLAIMS OF REPRESENTED EMPLOYEES.

We also believe that strong policy reasons support a rule allowing collective bargaining representatives to negotiate enforceable agreements requiring represented employees to resolve their employment disputes in arbitration rather than court.

---

[7] Unions that are exclusive bargaining agents of employees in the bargaining unit have the authority under § 9 of the NLRA, 29 U.S.C. § 159, to negotiate a binding grievance and arbitration procedure that employees must invoke to challenge the employer's actions on wages, hours, and working conditions. This authority extends to all disputes covered by the collective bargaining agreement, whether the employee's theory of recovery is contractual or based on an employment statute.

[8] Section 3 provides: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant is not in default in such proceeding with such arbitration." 9 U.S.C. § 3.

The first consideration from the standpoint of the affected employees is that the theoretical ideal should not be the enemy of the achievable good. For most non-managerial, non-supervisory employees — that is, employees potentially eligible for union representation under the National Labor Relations Act[9]—a private lawsuit with representation by competent private counsel is largely an illusory opportunity.[10] For the vast majority of claims likely to be asserted by the members of the labor union in this case, who work principally in janitorial positions for commercial office buildings, arbitration is likely to be a mode of redress far superior to its likely alternative—a *pro se* civil action in the federal or state courts. The empirical evidence to date also

[9] *See* 29 U.S.C. § 152(11) (supervisor exclusion); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974) (managerial employee exclusion).

[10] The existing data are fragmentary but revealing. In 1991, researchers found that plaintiff lawyers are not likely to take an employment discrimination case, regardless of merit, unless the employee earned more than $400 a week. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 1008 (1991). Howard's 1995 a survey of 321 plaintiff lawyers, all members of the National Employment Lawyers Association—the plaintiff employment bar association—found that these lawyers required a retainer of at least $3,000-$3,600. William M. Howard, *Arbitration Claims of Employment Discrimination: What Really Does Happen? What Should Really Happen?* DISP. RESOL. J. Oct.-Dec. 1995, at 40. Lewis Maltby reports a 1995 study of plaintiff lawyers finding that these lawyers would not take a case unless the employee had at least $60,000 in back pay damages. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998). *See also* Samuel Estreicher, *Beyond Cadillacs and Rickshaws: Towards A Culture of Citizen Service*, 1 N.Y.U. J. LAW & BUS. 323 (2005).

indicates that most employees often fare as well, if not better, in arbitration relative to their realistic prospects in litigation.[11] And, in many cases, the employees will have the benefit of experienced union representation during the grievance procedure and the assistance of able union counsel in the arbitration.

Internal processes culminating in final, binding arbitration are also distinctly preferable for many employment disputes because the relative speed and informality of grievance and arbitration permit a resolution to be obtained before the employment relationship has been severed—and often at early stages of the grievance procedure not even requiring an arbitration to be convened—and hence the employee retains a good prospect of continuing his career with the company despite his grievance.

The second consideration is one of efficiency both from the standpoint of employers and the courts. From the employer's perspective, it is difficult to manage an internal dispute system where some employees, because they are represented by labor unions, essentially are able to bypass internal processes with arbitration before a neutral as a final step, while other employees, because they are not so represented, are subject to predispute arbitration agreements. This both complicates the work of internal employee relations personnel and undermines the company and employee-wide interest in the uniform application of internal policies and procedures.

---

[11] *See* note 2 *supra.*

There is also an efficiency loss from the perspective of the courts because many of the cases that will end up in court, often in the form of *pro se* filings, could have been readily resolved either in the internal, pre-arbitration grievance process, or in arbitration. Internal resolutions are cases that never show up in agency or court dockets. Most cases involve fact-specific issues of who did what, to whom, when, where, and why. Such cases are common fare for the grievance / arbitration process where they are likely to receive a fair hearing, especially because the union in pressing a grievance—typically through multiple steps prior to arbitration—or the arbitrator may be particularly sensitive to the needs of the workplace. The vast majority of these claims are not suitable for the litigation process where they may, for sheer lack of representation if no other reason, receive short shrift.[12]

Finally, another important policy consideration is from the labor relations standpoint. Many of the Chamber's members have some segment of their workforce represented by labor unions for collective bargaining purposes. The essence of collective bargaining is mutual commitment to the process and to the outcomes of that process. It is corrosive of a good working relationship between employer and union if express agreements to submit all disputes to the grievance and arbitration process can be

---

[12] Also, to the extent binding union-represented employees to an arbitration bargain struck in good faith by their union and their employer proves problematic, it can simply be renegotiated or even eliminated in the next round of collective bargaining. Neither the employer nor the union would be likely to want to continue a regime that was not working to the satisfaction of affected employees.

circumvented where some employees either find counsel or sue on their own to pursue their statutory theories of recovery.

CONCLUSION

For the reasons stated above, *Amicus Curiae,* Chamber of Commerce of the United States of America, respectfully requests that the Court reverse the Second Circuit's decision affirming the District Court's denial of Petitioners' motion to compel arbitration.

Respectfully submitted,

ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

SAMUEL ESTREICHER
(Counsel of Record)
TODD R. GEREMIA
JONES DAY
222 East 41st Street
New York, NY 10017
(202) 326-3939

Counsel for Amicus Curiae

May 12, 2008